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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF KAREN G. SILKWOOD, DECEASED,
Appellant,

v.

KERR-MCGEE CORPORATION AND KERR-MCGEE NUCLEAR CORPORATION,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM, INC. AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether the award of punitive damages in this case for injury caused by a federally licensed plutonium processing facility is preempted by the Atomic Energy Act.

2. Whether the preemption of punitive damages violates due process or equal protection.

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM, INC. AS *AMICUS CURIAE*

In accordance with this Court's Rule 36, Atomic Industrial Forum, Inc. ("AIF" or "the Forum") has received and filed with the Court the written consents of counsel for each of the parties to appear as *amicus curiae* in this proceeding. This brief is submitted in support of the position of Appellees Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation (hereinafter referred to as "Appellees" or "Kerr-McGee").

INTEREST OF THE *AMICUS CURIAE*

The Forum is an association of about 550 domestic and overseas organizations interested in development of the peaceful uses of nuclear energy. Its members include electric utilities, manufacturers, architect-engineers, con-

sulting firms, mining and milling companies, and others, who design, build, operate, and service facilities for the production of nuclear fuel and the generation of nuclear power. Appellee Kerr-McGee Corporation is a member of the Forum. Members of the Forum are possible defendants in law suits that might be brought in the unlikely event of an incident at a nuclear plant. If the judgment of the Court of Appeals is reversed, normal operations of nuclear facilities in compliance with the pervasive federal regulatory program would become subject to tort actions that, as in this case, could result in judgments for millions of dollars in punitive damages. The spectre of such tort suits in which juries apply unfounded, unidentifiable, and changing standards for radiation exposures and releases would make private industry reluctant to remain involved in nuclear energy projects.

The Forum believes that the Court of Appeals was correct in its determination that the Atomic Energy Act preempts any award of punitive damages. Awards of such damages conflict with the comprehensive regulatory scheme created by the Act. Preemption of such damages does not violate equal protection or due process, contrary to the claim made by Appellant in his Jurisdictional Statement at 24-29, but apparently abandoned in his brief on the merits.

STATEMENT OF THE CASE

Karen Silkwood worked with plutonium as a laboratory analyst at the Cimarron plant of Kerr-McGee Nuclear Corporation, a subsidiary of Kerr-McGee Corporation, located near Crescent, Oklahoma.

The Cimarron plant was licensed by the Atomic Energy Commission[1] "to possess and use special nuclear

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[1] The Atomic Energy Commission was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5879 (1976 & Supp. V 1981). Its licensing and regulatory functions were transferred

material in a plutonium processing and fuel fabrication plant." *See* 10 C.F.R. § 70.21(a) (1983); Defendants' Exs. 1, 2. Subsequent to the events giving rise to this case, the plant was closed for economic reasons. While it was operating, it was subject to comprehensive regulation by the Commission, including inspections by representatives of the Commission's Regional Office. *See* J.A. 1511-24.[2]

Plutonium is a "special nuclear material" as that term is defined in 42 U.S.C. § 2014(aa) (1976). It is a man-made radioactive element, of atomic number 94, and of various atomic weights. The danger associated with plutonium is not its presence in small quantities on the skin or clothing, but rather its internal deposition, *i.e.*, by inhalation. The isotope of plutonium of concern in this case is plutonium-239. It is a fissionable material, which means that its nucleus may split in such a way as to support a chain reaction, during which energy is released.

In the course of her employment, Karen Silkwood was contaminated with plutonium at the Cimarron facility on November 5 and 6, 1974. As a result of that contamination, she was required to submit urine and fecal samples to the plant's laboratory for analysis. She was taking a urine sample in her apartment on November 7, 1974, when she spilled that sample in the bathroom. She was thereby contaminated, as was her apartment, with an additional dose of plutonium. It was stipulated by the parties that all the plutonium that contaminated Karen Silkwood came from the Cimarron facility. It was also stipulated that the urine sample she spilled was "spiked",

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to the Nuclear Regulatory Commission. 42 U.S.C. § 5841(f) (1976). For the sake of convenience, both agencies will be referred to as the "NRC" or "the Commission."

[2] As used herein, "J.A." refers to the Joint Appendix in the Court of Appeals for the Tenth Circuit, and "Tr." refers to the transcript of the proceedings in the trial court.

i.e., the plutonium contained in that sample did not pass through her body, but rather had been added by some other means.

The amount of plutonium in the Cimarron facility was at times substantial, but the amount involved in Silkwood's contamination was extremely small. The total amount of plutonium found in Karen Silkwood's apartment on November 7, 1974, was less than three ten-thousandths of a gram and the total amount found in her lungs was 81.5 nanograms or 81.5 billionths of a gram. J.A. 921-22. This corresponds to approximately 5 nanocuries or 5 billionths of a curie of plutonium-239.[3] Karen Silkwood had a total of 8.8 nanocuries of plutonium in her body after her contamination on November 7, 1974. She died in an automobile accident on November 13, 1974, 8 days after the first contamination incident. J.A. 1438-39.

The standards of the International Commission on Radiological Protection and the National Council on Radiation Protection, upon which the Commission's regulations are based, set the maximum permissible occupational body burden for plutonium at 40 nanocuries for the whole body and 16 nanocuries for the lung. *Id.*; Tr. 7080, 7146-47.

The jury awarded Appellant $10,505,000 in damages for the contamination incidents described above. *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 570 (W.D. Okla. 1979). The trial judge denied a motion for judgment *n.o.v.* *Id.* at 594. The jury's award of $5,000 for contamination of Karen Silkwood's apartment was affirmed by the Court of Appeals and is not before the

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[3] A curie is a unit used in measuring radioactivity. One curie equals the disintegration of 3.7×10^{10} nuclei per second and is equal to the radioactivity of one gram of radium-226. NUCLEAR ENERGY POWER STUDY GROUP, NUCLEAR POWER ISSUES AND CHOICES 408 (1977).

Court. *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 921 (10th Cir. 1981). The jury's award of $500,000 for the contamination of Karen Silkwood was reversed by the Court of Appeals on the ground that the Oklahoma workers' compensation statute provided the exclusive remedy for her claim, and that issue is not before the Court. *Id.* at 919-20. The only issue before the Court is the propriety of the jury's award of $10,000,000 in punitive damages, which the Court of Appeals held was preempted by the Atomic Energy Act.

SUMMARY OF ARGUMENT

The court below invalidated the award of punitive damages based on its conclusion that such state regulation was preempted by the Atomic Energy Act. *Silkwood*, 667 F.2d at 923. The holding of the court below should be affirmed because section 274 of the Atomic Energy Act, 42 U.S.C. § 2021 (1976 & Supp. V 1981), expressly preempts an award of punitive damages in this case, and because Congress intended to have the federal government occupy the field of regulation of radiation hazards for the protection of public health and safety.

First, section 274 expressly prohibits state regulation of special nuclear material, which includes plutonium, in a quantity sufficient to form a critical mass. Oklahoma is explicitly precluded from exercising any type of regulatory authority over Appellees since Appellees were licensed to use and possess at the Cimarron facility a quantity of plutonium sufficient to form a critical mass, as defined by the Commission's regulations. Because the purpose of an award of punitive damages is to punish egregious conduct and deter similar conduct by the actor or others in the future, it is a potent means of state regulation that must be preempted when applied to a subject matter explicitly reserved to the federal government.

Second, the award of punitive damages is impliedly preempted by the Atomic Energy Act, as interpreted in *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713 (1983). Since Congress has occupied the field of nuclear safety regulation, the award of punitive damages cannot be upheld if it in any way affects the subject matter reserved to the federal government. It is beyond doubt that the award of punitive damages in this case was addressed to nuclear safety and that such awards by definition are intended to have a regulatory effect. Since the award of punitive damages exerts state authority over a subject matter within the exclusive purview of the federal government, the award of punitive damages should be held to be preempted. The Price-Anderson Act, which was not triggered under the facts in this case, does not support Appellant's argument that the award of punitive damages is not preempted.

The question of whether the preemption of punitive damages violates due process or equal protection has not been briefed, because it appears that Appellant has abandoned this issue.

ARGUMENT

I.

THE AWARD OF PUNITIVE DAMAGES IN THIS CASE IS EXPRESSLY PREEMPTED BY THE ATOMIC ENERGY ACT.

Preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted) (holding that the Federal Meat Inspection Act expressly prohibited labeling requirements in addition to those imposed under the Act). Since the punitive damage award in this case served as state regulation of radiation hazards for the protection of public health and safety, the award is expressly preempted by section 274 of the Atomic Energy Act. 42 U.S.C. § 2021 (1976 & Supp. V 1981).

Congress, in 1959, amended the Atomic Energy Act to clarify the responsibilities of the states and the Commission with respect to the regulation of byproduct, source, and special nuclear materials. 42 U.S.C. § 2021(a)(1) (1976). *See* S. REP. No. 870, 86 Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2880-83. The amendment added section 274 to the Act, authorizing the Commission to enter into agreements with the states for the discontinuance of NRC's regulatory authority with respect to byproduct material, source material, and special nuclear material in quantities not sufficient to form a critical mass. 42 U.S.C. § 2021(b) (Supp. V 1981). Congress provided: "During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards." *Id.* Thus, Congress authorized the Commission to return to the

states authority to regulate certain nuclear materials pursuant to such an agreement.[4]

Congress, however, expressly prohibited the Commission from discontinuing its regulatory authority over special nuclear materials in quantities sufficient to form a critical mass. 42 U.S.C. § 2021(b) (Supp. V 1981). Since Kerr-McGee's Cimarron plant was licensed by the Commission to possess a quantity of plutonium sufficient to form a critical mass,[5] the Act explicitly directs the Commission to continue regulation for the protection of public health and safety from radiation hazards. Moreover, Oklahoma has never entered into an agreement with the NRC for the transfer of regulatory authority. Oklahoma, therefore, is expressly preempted from imposing any form of regulation for protection of public health and safety from the special nuclear materials used at the Cimarron plant.

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[4] The purpose of this amendment to the Atomic Energy Act was to increase the role of the states in regulating nuclear power. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1713, 1724 (1983). During hearings on the 1959 Amendment, however, the Commission indicated that "certain areas would be excluded [from state regulation] because the technical safety considerations are of such complexity that it is not likely that any state would be prepared to deal with them . . . ." *Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. 294 (1959) (letter of A.R. Luedecke, General Manager, Atomic Energy Commission).

[5] Special nuclear material is defined to include plutonium. 42 U.S.C. § 2014(aa) (1976). For purposes of § 274, the Commission has determined that for plutonium a quantity exceeding 200 grams is sufficient to form a critical mass. 10 C.F.R. § 150.11(a) (1983). To determine whether the license is governed by the regulations of an agreement state, the licensee must include the total quantity of special nuclear material that it is authorized to receive, possess, or use at the plant at any one time. 10 C.F.R. § 150.11(b) (1983). Kerr-McGee was licensed to use and possess 360 kilograms of plutonium at its Cimarron facility under License No. SNM-1174. Defendants' Ex. 2.

The award of punitive damages is an attempt to regulate plutonium and its use for the protection of public health and safety. Punitive damages by definition are not intended to compensate the injured party, but to punish the wrongdoer and deter him and others from similar egregious conduct in the future. *Smith v. Wade*, 103 S. Ct. 1625, 1639 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). *See* W. PROSSER, LAW OF TORTS 9-10 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 908 (1977). The Oklahoma Supreme Court has recognized that an award of punitive damages is permitted "because as a matter of policy the punishment of the transgressor may serve as an example to the rest of society that conduct of a similar kind will not be allowed." *Nixon v. Oklahoma City*, 555 P.2d 1283, 1285 (Okla. 1976).*

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959), this Court invalidated a compensatory damage award issued under state tort law because it indirectly regulated conduct in an area under the exclusive control of the federal government. Moreover, the Court explicitly rejected the argument that an award of damages was not a form of state regulation: "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *Id.* at 247.

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* *Amici* in support of Appellant contend that the award of punitive damages should not be preempted because of its "strong compensatory effect." Brief *Amicus Curiae* of Arizona, Connecticut, Hawaii, *et al.* at 13-15. Contrary to this claim, it is well established that the *raison d'etre* for punitive damages is to punish the wrongdoer and deter future egregious conduct. *Smith*, 103 S. Ct. at 1639; *City of Newport*, 453 U.S. at 266-67; *Nixon*, 555 P.2d at 1285; RESTATEMENT (SECOND) OF TORTS § 980 (1977). Notwithstanding the claim of *Amici*, it is the regulatory effect of the award of punitive damages on nuclear safety and protection of public health from radiation hazards that is critical to the preemption analysis in the case at bar.

The Court acknowledged that state regulation can be as effectively enforced through an award of damages as through some form of injunctive relief. *Id.*

It is well settled that a state court may not enjoin conduct expressly permitted by federal law. This Court has long recognized that, if a state court injunction is barred by federal law, so is an award of damages for the same conduct. *Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953).

In the instant case, the award of punitive damages has in effect regulated a subject matter that is expressly within the exclusive control of the federal government. If preemption is not found, state courts will be permitted to impose unfounded and changing standards for exposure to, and release of, radiation on the nuclear industry. As the Court found in *Garmon*, such awards would become a potent, but impermissible, regulatory tool. Such authority to regulate nuclear safety and radiation hazards, however, expressly remains with the NRC and not with the states. This Court should hold that section 274 of the Atomic Energy Act, 42 U.S.C. § 2021 (1976 & Supp. V 1981), expressly preempts the award of punitive damages in this case.

II.

THE AWARD OF PUNITIVE DAMAGES IN THIS CASE IS IMPLIEDLY PREEMPTED BY THE ATOMIC ENERGY ACT.

The award of punitive damages is also impliedly preempted by the Atomic Energy Act. The Court has recognized two types of implied preemption, subject matter preemption and actual conflict preemption. Subject matter preemption will be found when it is demonstrated that Congress intended to occupy the entire field, thereby making concurrent state regulation invalid. *See Pacific Gas and Electric*, 103 S. Ct. at 1726; *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982); *Rice v. Santa Fe Elevator Corp.*, 331

U.S. 218, 230 (1947). Subject matter preemption can be implied by Congress in several ways:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Rice, 331 U.S. at 230 (citations omitted). Actual conflict preemption will be found when it is demonstrated that Congress has not intended to preempt an entire subject matter, but state law actually conflicts with federal law. When conflict preemption is invoked, state law is nullified only to the extent it actually conflicts with federal law. *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Such a conflict arises either when "compliance with both federal and state regulations is a physical impossibility," *id.*, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).

Subject matter preemption is much broader than conflict preemption since state law is nullified in its entirety if it in any way regulates the preempted subject matter. *Rice*, 331 U.S. at 236. *See Pacific Gas and Electric*, 103 S. Ct. at 1726-27; Note, *Implied Preemption of Punitive Damages for Nuclear Accidents*, 29 AM. U. L. REV. 741, 750 (1980).

Since the federal government has occupied the field of nuclear safety regulation, states should not be permitted to regulate radiation hazards for the protection of public health and safety. In this case, the award of punitive damages in effect imposes regulation on a subject matter preempted by the Atomic Energy Act.

A. Congress Has Impliedly Preempted Any State Regulation of Nuclear Safety and Radiation Hazards.

In *Pacific Gas and Electric Co.*, 103 S. Ct. 1713, 1726 (1983), this Court determined that any state regulation of radiation hazards for the protection of public health and safety is impliedly preempted by the Atomic Energy Act. The Act and its amendments have erected a dual scheme of nuclear regulation: "[T]he federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Id.* (footnote omitted).

In *Pacific Gas and Electric*, the Court specifically rejected the argument that the states could impose safety regulation on nuclear facilities:

> State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government."

Id. (footnote omitted), *quoting Rice*, 331 U.S. at 236. Any state regulation of nuclear safety, therefore, is impliedly preempted since Congress intended for the federal government to regulate this entire subject matter.[7]

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[7] State regulation is permitted in specific areas expressly delineated by Congress. The Act provides the states with the opportunity to enter into agreements with the NRC under which the Commission discontinues its authority to regulate small quantities of nuclear materials. 42 U.S.C. § 2021(b) (Supp. V 1981). In addition, Congress explicitly authorized the states in the Clean Air Act Amend-

Under the test enunciated in *Pacific Gas and Electric*, any direct or indirect state regulation of radiation hazards for the protection of public health and safety is impliedly preempted by the Atomic Energy Act. Thus, the critical issue is whether the award of punitive damages in this case directly or indirectly regulates the subject matter under the exclusive control of the federal government.[8]

B. Punitive Damages Were Used in This Case to Regulate Nuclear Safety and Radiation Hazards.

The award of punitive damages in this case was used as a means to regulate nuclear safety and radiation hazards. If this Court fails to hold that this award is preempted, the states will have secured a means by which they can impose safety standards and regulations on the nuclear industry.

Punitive damages by definition are not intended to compensate an injured party in a tort case, but to punish

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ments of 1977 to regulate radioactive air pollutants released from nuclear plants. 42 U.S.C. § 7422 (Supp. V 1981). States also may impose certain siting and land use requirements for nuclear plants. NRC Authorization Act of 1980, Pub. L. No. 96-295, 94 Stat. 780 (1980).

[8] *Amici* in support of Appellant contend that the Court of Appeals enunciated a new test for preemption when it held "invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." *Silkwood*, 667 F.2d at 923. *See* Brief of the National Women's Health Network as *Amicus Curiae* at 17; Brief *Amicus Curiae* of Arizona, Connecticut, Hawaii, *et al.* at 11. Although the Court of Appeals did not elaborately describe its test for preemption, it is beyond peradventure that the court used the theory of subject matter preemption to invalidate the award of punitive damages. The court relied on Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972), for its finding that Congress intended the federal government to occupy the entire field of regulating nuclear safety and protecting public health from radiation hazards. *Silkwood*, 667 F.2d at 922-23.

the wrongdoer and to deter him and others from similar egregious conduct in the future. *Supra* at 9. Indeed, punitive damages have been characterized as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), *quoted in International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). *See Scott v. Donald*, 165 U.S. 58, 86-87 (1897). In *Nixon v. Oklahoma City*, 555 P.2d 1283, 1285 (Okla. 1976) (citation omitted), the Oklahoma Supreme Court explained that punitive damages are awarded to the injured party "not because his position is meritorious but because society is benefited by deterring similar conduct. If no social benefit is to be derived from the imposition of exemplary damages, all legal justification for the award collapses." *See supra* note 6.

In *Garmon*, 359 U.S. at 246-47, the Court explicitly rejected the argument that an award of compensatory damages was not a form of state regulation:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Thus, the Court emphasized that the proper focus of a subject matter preemption inquiry is upon the areas of conduct affected by the state's action, not the form this action takes. The Court acknowledged that in particular

situations an award of damages or even an injunction might in fact not conflict with federal authority, but "[t]o sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern." *Id.* at 247. Regardless of the type, "remedies form an ingredient of any integrated scheme of regulation . . . ." *Id.* Since punitive damages have an even greater deterrent and regulatory effect than compensatory damages, the Court should find them to be preempted by the Atomic Energy Act.

In the Atomic Energy Act, Congress authorized the Commission to establish "standards and instructions to govern the possession and use of special nuclear material . . . as the Commission may deem necessary or desirable . . . to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b) (1976). Pursuant to its statutory authority, the NRC has promulgated detailed regulations governing nuclear power, 10 C.F.R. Parts 0-170 (1983), including requirements for protection against radiation hazards that plants like Kerr-McGee's Cimarron plant must observe. 10 C.F.R. Part 20 (1983). Specific exposure and release limits are set forth in 10 C.F.R. Part 20 and Appendix B thereto.

Violations of the Atomic Energy Act or the Commission's regulations are subject to both civil and criminal penalties. 42 U.S.C. §§ 2271-84 (1976 & Supp. V 1981). *See, e.g.*, 10 C.F.R § 20.601 (1983). Specifically, for any violation of its licenses, Kerr-McGee was subject to civil penalties imposed by the Commission. 42 U.S.C. § 2282 (1976 & Supp. V 1981). For each violation, the Commission may impose a fine not to exceed $100,000, but if the violation is of a continuing nature, each day constitutes a separate violation. *Id.* Congress also provided for criminal sanctions, including substantial fines and imprisonment, for willful violations of various provisions of the Act. 42 U.S.C. §§ 2272-79, 2283-84 (1976 & Supp. V 1981). The Attorney General is authorized to

seek injunctive relief when the Commission determines that someone is violating or about to violate any provision of the Act or any regulation issued pursuant to the Act. 42 U.S.C. § 2280 (1976). Finally, the NRC may initiate proceedings to modify or revoke any license issued under the Act for violation of, or failure to observe, any of the provisions of the Act or of any regulation of the Commission. 42 U.S.C. §§ 2236-37 (1976). Indeed, when public health and safety are in imminent danger, the Commission may immediately recapture any special nuclear material or enter and operate the facility prior to any of the required proceedings. 42 U.S.C. §§ 2236(c) (1976).

The award of punitive damages disregards the Commission's elaborate regulations and standards and in their place imposes an unquantifiable and previously unknown standard arrived at by a jury of laymen. The trial court instructed the jury to weigh the Commission's standards for exposure to radiation as they would any expert testimony:

> You are instructed, however, that you are not bound by these standards. Your duty is to determine what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it.

485 F. Supp. at 598. Thus, the jury was permitted to replace the NRC standards with its own standards for exposure to plutonium.[9] Under the test for preemption enunciated in *Pacific Gas and Electric*, 103 S. Ct. at 1726, Oklahoma is asserting its right to pass judgment upon conduct exclusively regulated by the federal government.

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[9] The trial court further instructed the jury that compliance with Commission regulations "would not necessarily preclude a finding of blameworthy conduct under all the facts and circumstances shown by the evidence." 485 F. Supp. at 598.

If Oklahoma had investigated the incident in question and imposed a civil fine of $10 million, or if a state court had enjoined further operation of a licensee's facility because of exposure to, or release of, nuclear material, there is no doubt that either action would be be preempted. By upholding the award of punitive damages, the trial court permitted the state to accomplish regulation of radiation hazards and nuclear safety though this regulation would be invalid if the state had employed different means.

C. The Price-Anderson Act, Which Is Part Of The Atomic Energy Act, Does Not Permit An Award Of Punitive Damages.

Based on the legislative history of the original Price-Anderson legislation and the 1966 amendment thereto, Appellant contends that Congress did not intend to preempt awards of punitive damages under state tort law, such as the award at issue herein. Brief of Appellant at 24-27, 29-41. Contrary to Appellant's position, Congress by enacting, amending, and reauthorizing the Price-Anderson Act did not intend to save an award of punitive damages under state tort law from federal preemption. Appellant's argument ignores section 274 of the Atomic Energy Act, 42 U.S.C. § 2021 (1976 & Supp. V 1981), this Court's reading of the congressional intent underlying the Atomic Energy Act in *Pacific Gas and Electric*, and the purposes of the Price-Anderson Act.

Appellant mistakenly attempts to separate the Price-Anderson provisions from the remainder of the Atomic Energy Act and specifically ignores section 274. Section 274, which was added to the Act in 1959 to "clarify the respective responsibilities . . . of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials," 42 U.S.C. § 2021 (a)(1) (1976), must be read with the Price-Anderson Act in addressing the preemption of the punitive damages

award in question. *See* S. REP. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2880-83. Section 274(b) authorizes the Commission to enter into agreements with the states under which the NRC will discontinue its regulatory authority with respect to byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. 42 U.S.C. § 2021(b) (Supp. V 1981).

In adopting the 1966 amendments to the Price-Anderson Act, Congress did not provide the states with authority to regulate radiation hazards for protection of public health and safety. Only pursuant to a section 274 agreement can a state regulate nuclear safety, and then its authority is confined to small amounts of nuclear materials. *See supra* at 7-8.

Appellant's position is further undermined by this Court's holding in *Pacific Gas and Electric*, 103 S. Ct. at 1726 & n. 25, that the federal government has completely occupied the field of nuclear safety regulation, except where limited powers are "expressly ceded to the states." *See supra* note 7. Contrary to Appellant's argument, the Price-Anderson Act simply does not contain an explicit provision that authorizes states to regulate radiation hazards for the protection of public health and safety through any means, including an award of punitive damages.

Furthermore, Congress intended the Price-Anderson compensation scheme to be triggered only after a catastrophic nuclear accident. *See* S. REP. No. 1605, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS, 3201, 3206, 3209; S. REP. No. 650, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3209, 3212. The liability limitation, indemnification, and waiver of defenses provisions of the Price-Anderson Act are inapplicable unless the NRC determines that an extraordinary nuclear occurrence ("ENO") has taken

place.[10] 42 U.S.C. §§ 2210(c)-(e), (m)-(o) (1976); 10 C.F.R. § 140.81 (1983).

In this case, these Price-Anderson provisions are inapplicable because no ENO occurred throughout Karen Silkwood's exposure to plutonium. As we have shown, *supra* at 4, Karen Silkwood did not receive plutonium exposure in excess of the limitations specified by the NRC in 10 C.F.R. Part 20 and Appendix B thereto. For the NRC to determine that an ENO has occurred, a discharge or dispersal of radioactive material would have to exceed "by some significant multiple the appropriate regulatory limit." 10 C.F.R. § 140.81(b)(1) (1983). The Commission has stated that the Price-Anderson compensation scheme would not be triggered by a release slightly in excess of a regulatory limit. *Id. A fortiori*, where exposure does not exceed the appropriate regulatory limits, the liability limitation, indemnification, and waiver of defenses provisions of the Price-Anderson Act do not apply and cannot be relied on by Appellant to avoid preemption of punitive damages.

Finally, the award of punitive damages in this case defeats the purpose for which the Price-Anderson Act was enacted. Congress added the Price-Anderson scheme to the Atomic Energy Act "to protect the public by assuring the availability of funds for the payment of claims arising from a catastrophic nuclear incident" and "to remove a deterrent to private industrial participation in the atomic energy program posed by the threat of tremendous potential liability claims." S. REP. No. 1605, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS

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[10] The NRC's interpretation of the Atomic Energy Act is entitled to significant deference. Power Reactor Dev. Co. v. Int'l Union of Elec. Workers, 367 U.S. 396, 408-09 (1961); *see* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 51 U.S.L.W. 4678, 4682 (U.S. June 6, 1983); Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of America, Inc., 423 U.S. 12, 14-15 (1975) (*per curiam*).

3201, 3206; S. REP. No. 650, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3209, 3212.

The funds made available under the Price-Anderson scheme are intended for the "rapid and adequate financial compensation" of those injured in a catastrophic nuclear accident. S. REP. No. 650, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3209, 3220. Since the amount of money available for victim compensation, though large, is nevertheless limited, awards of punitive damages could inordinately deplete the fund and thereby preclude full compensation of all injured parties. Such a result would be contrary to the congressional intent underlying the Price-Anderson Act.

Furthermore, awards of punitive damages should not be upheld based on a statute that attempts to limit the nuclear industry's liability and strives to promote private participation in the nuclear field. Private industry will be reluctant to remain involved in nuclear energy if it will be subject to unpredictable jury awards of punitive damages in addition to NRC fines. Without a holding of preemption in this case, the industry will find itself subject to tort suits in which juries may apply unfounded, unidentifiable, and changing standards for radiation exposures and releases.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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